United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 979

Case No. 1090: AL-HAFIZ

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas, on 15 March 1999, Saber Saleh Abd Al-Hafiz, a former staff member of the staff members of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 July 1999, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"...

I am requesting payment of all monies due to me since my services were terminated on 27 November 1997 to date of reinstatement, together with all the benefits, holidays and annual increments to which I would have been entitled during that period. I am further requesting legal expenses of US$ 50,000.

The decision I seek is my reinstatement to my former post, the annulment of the decision to terminate my services and of all the reprimands with which I was served. Punitive measures should be taken against the Director of UNRWA Operations, Jordan, the Irbid Area Health Officer … and the Irbid Area Officer …

The termination of my services with UNRWA has cast a slur on my reputation. As a result, the number of patients visiting my private clinic has fallen sharply, as has my income. My mental health has been adversely affected, as has the health of my wife and children. My wife and I are still receiving psychiatric treatment. I am therefore seeking the sum of $1 million in compensation."

Whereas the Respondent filed his answer on 28 February 2000;

Whereas the Applicant filed written observations on 22 April 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 17 November 1994 as an Area staff member at the Irbid Specialized Clinic, Jordan, on a temporary indefinite appointment as Ophthalmologist, grade 15. On 1 January 1996, the Applicant was promoted to grade 16. He was separated from service on 27 November 1997.

Commencing in January 1996, the Applicant was involved in a series of incidents and problems involving not only his superiors but his fellow employees as well, culminating in a letter of censure from the Filed Administration Officer, Jordan, dated 16 September 1996, salary increment deferrals on 15 December 1996 and 10 April 1997, as well as suspension without pay in March 1997, an additional letter of censure from the Officer-in-Charge, Administration Department, Jordan, dated 27 March 1997, and threats of further disciplinary action unless his performance improved.

In a letter dated 22 September 1997, the Area Health Officer inquired about the Applicant's absence on sick leave on 13 September 1997 noting that the Applicant had attended and treated his private patients at his own clinic on that day. The Applicant's explanation was that he had been visiting his personal physician whose office was located in the same building.

On 6 October 1997, the Chief, Field Health Programme, requested the Deputy Chief, Field Health Programme and the Field Family Health Officer, Jordan, to investigate the matter. On 6 November 1997, after the completion of the investigation, they concluded that the Applicant had tried to mislead the Agency and that his absence on 13 September 1997 had been unauthorized. They

found that he intentionally gave false allegations relating to the circumstances of his presence at his clinic on 13 September 1997, and recommended that his services be terminated in the interest of the Agency. Based on the Applicant's record, they concluded that no improvement in his conduct, attitude or performance could be expected.

On 27 November 1997, the Director of UNRWA Operations, Jordan, informed the Applicant that, in view of his bad service record, it had been decided to terminate his employment in the interest of the Agency pursuant to the provisions of staff regulation 9.1 and staff rule 109.1.

On 30 November 1997, the Applicant requested that the Director of UNRWA Operations, Jordan, review the decision to terminate his service.

On 18 December 1997, the Director of UNRWA, Operations, Jordan, responded that, after reviewing the administrative decision, he found no reason to alter it.

On 5 January 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 24 May 1998. Its evaluation, judgement and recommendation read as follows:

"**EVALUATION AND JUDGEMENT**

...

(a) The Board noted that the termination of the Appellant's appointment was properly made in accordance with Area Staff [Regulations and Rules].

(b) The Board also noted that the Appellant's behaviour through his years of service with the Agency was improper and [that he] was served with several disciplinary measures.

(c) In this context, the Board believes that the Administration has acted within the framework of standing [Regulations and Rules] without the interference of prejudice or any other extraneous factors.

IV. RECOMMENDATION

37. In view of the foregoing and without prejudice to any further oral of written submission to any party, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed."

On 21 June 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "...
>
> I have carefully reviewed the report and noted its conclusions. The Board noted that the termination of your services was conducted in accordance with the relevant Area Staff Regulations and Rules. It also noted the negative performance appraisals which you have received and concluded that the Administration acted within the framework of standing Regulations and Rules, without the interference of prejudice or any other extraneous factors. The Board unanimously recommended that your appeal be dismissed.
>
> I agree with the Board's recommendations and dismiss your appeal.
>
> ..."

On 20 and 24 February 1999, the Applicant requested that the Respondent further review his case.

On 1 March 1999, the Director of Administration and Human Resources informed the Applicant that the Respondent had made his decision and that the Applicant should submit an application to the Administrative Tribunal. The Applicant filed an appeal to the Tribunal, contesting the JAB determination supporting the Respondent's decision to terminate his employment. The JAB report had been rendered on 31 May 1998 and communicated to the Applicant on 21 June 1998; the Applicant's appeal was filed on 6 July 1999, thereby exceeding the statutory filing limit by more than one year. The Applicant's reason for the late filing was that he had suffered severe depression resulting from his discharge from employment.

Whereas the Applicant's principal contentions are:

1. The Applicant's failure to present a timely appeal to the Tribunal was a result of severe psychological distress and is therefore excusable.

2. The decision terminating the appointment of the Applicant lacked legal justification and was based on insufficient evidence.

3. The recommendation of the JAB to dismiss the Applicant's appeal was biased and a result of improper external pressure.

Whereas the Respondent's principal contentions are:

1. The application is not receivable by the Tribunal since it was not filed within the permissible time limits.

2. The Respondent's decision to terminate the appointment of the Applicant was in the interest of the Agency and was neither tainted by prejudice or improper motivation nor procedurally defective.

The Tribunal, having deliberated from 1 to 17 November 2000, now pronounces the following judgement:

I. The Respondent raises a preliminary objection regarding the receivability of the application, arguing that it was not timely. Staff rule 111.2 (f) provides that an appeal shall not be receivable unless the time limits have been met or have been waived "in exceptional circumstances". The Tribunal has consistently held that these circumstances are defined in the following manner: "only circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review and filing an appeal in time, may be deemed to constitute 'exceptional circumstances'" (Judgement No. 372, *Kayigamba* (1986), quoting JAB report No. 510, para. 33; see also Judgement No. 713, *Piquilloud* (1995)). As the preliminary issue involves consideration of the Applicant's honesty, reliability and integrity as a witness, it is necessary for the Tribunal to initially deal with some of the substantive issues raised by the Applicant, as these bear on that preliminary question.

II. The Applicant was informed on 27 November 1997 by the Director of UNRWA Operations, Jordan, that it had been decided to terminate his services "in the interest of the Agency" in view of his bad service record.

The letter of 27 November 1997 set out reasons for that decision. It referred to the Applicant's absence from duty on 13 September 1997 allegedly "on sick leave" which was found to have been unauthorized.

III. The principal evidence relied upon in support of the allegation against the Applicant was a prescription and sick note dated 13 September 1997 written on the Applicant's letterhead bearing what appeared to be his stamp and his signature and apparently written in his handwriting. The documents, if taken at face value, clearly indicated that he had been working and treating a patient in the private clinic on that date.

In the course of the investigation of the complaint in relation to the 13 September 1997 events, the Applicant was shown the documents in question. He denied writing them and initially denied that they bore his signature. He suggested that they may have been written by the "Relieving Physician" who he claimed was on duty in the private clinic on that date. He claimed that he did not see any patients in his private clinic on that date notwithstanding the report, the stamp and the signature. The Applicant suggested that the "Relieving Physician" normally signed his own name on documents but that occasionally he signed the Applicant's name on them. Furthermore, he had asked his colleague to use his own stamp. Finally he indicated that, if he in fact issued the note, it must have been issued on a date other than 13 September 1997 and that the date on the note was a mistake. The written record of the interview at which he made these explanations was duly signed by the Applicant.

IV. In his application, the Applicant argues for the first time that the events which allegedly had taken place on 13 September 1997 in fact occurred on 14 September 1997, a date when he was not on certified sick leave. Abandoning his earlier claim that he had not written the prescription or the sick note as had been previously suggested by him, he now claimed that on 14 September 1997 a patient came to his private clinic claiming to be a student at Yarmuk University in Irbid. He claimed that this person had asked him to give her a sick note for the 13th September 1997 when she had been absent from the University and stated that:

"In view of her state of health, and because she was very insistent, I gave her a prescription and a medical report on her health bearing the previous day's date. That was at her request, and in order to cover her absence from the University on that date. On 22 September 1997 I was shocked to receive a letter from [the Area Health Officer, Irbid] asking for comments on my alleged treatment of patients in my private clinic when I had been absent on sick leave on 13 September 1997. On 24 September 1997 I responded that I had treated no patients in my private clinic on the day in question (...). However, this response appeared inadequate to [the Area Health Officer, Irbid]. I was unaware that he had in his possession the original of the prescription and medical report I had made out for the female patient mentioned above. An official investigation was carried out by the Deputy Chief of the Field Health Programme and another official. I made it quite clear to them that I had seen no patients when I was on sick leave on the day in question, and that another eye specialist had been covering for me during that absence. If any medical report had been made out, it could well have been issued by the other specialist. If it was I who had issued the prescription and medical report, they must have been made out incorrectly on a different day. I knew nothing about the aforementioned female patient: they did not give me a copy of the medical report or tell me the patient's name while the investigation was being carried out. Two days after the investigation, having checked all the records in my private clinic on those who had been to see me during that week, it became clear to me that a report had been made out for the patient on 14 September 1997, in order to explain her absence from the University on 13 September 1997, and that it had been done at her request and because she had been very insistent."

The Applicant also explained that he believed that the incident of 13 September 1997 was "a set-up", a trap which had been conceived by the Area Health Officer, Irbid, with whom he had a personal disagreement. The Tribunal notes that instead of recognizing or acknowledging the error of his own ways - that he had deliberately issued a student with a falsified sick note and prescription bearing incorrect dates, or that he had treated a patient at his own private clinic when on sick leave from the Irbid Specialist Clinic - the Applicant sought to characterize what had occurred as "a trumped up farce".

V. The Tribunal has considered the Applicant's irreconcilable explanations relating to the events of 13 September 1997 and concludes that the Applicant's conduct can only be described as dishonest and reprehensible and that as a witness he is unworthy of credibility. Consequently, the Tribunal cannot accept the Applicant's argument that the time-bar should be waived.

VI. The Respondent's preliminary objection on the grounds of receivability arises from article 7, paragraph 4 of the Tribunal's Statute which provides that "an application shall not be receivable unless it is filed … within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant." The decision of the Respondent based on the report of the JAB was communicated by the Respondent to the Applicant on 21 June 1998. The Applicant did not submit his application to the Tribunal until 6 July 1999, more than one year later. The Applicant requests the Tribunal to suspend the time limits in accordance with article 7, paragraph 5, of the Statute. In support of his request he states that "[i]t should be noted that my failure to submit the application within the specified time limits was due to my being in a very poor psychological state [as attested in a medical report dated 14 March 1999 from a Neuropsychiatrist in Irbid, a copy of which he provided] brought on by the termination of my services and requiring me to seek psychiatric treatment that I continue to receive to this day. Furthermore, I was not aware of the conditions attached to submission of an application to the Tribunal." The medical report referred to above states that on 20 December 1997 (which was six months before the Applicant learned of the Respondent's decision) the Applicant received treatment at a private clinic. According to the Neuropsychiatrist, the Applicant "appeared to … be suffering from severe depression, together with headaches, difficulty in sleeping and general physical exhaustion. This condition was brought on by the termination of his services with UNRWA. [He was given] the appropriate medication, and [he remains] under medical supervision".

VII. The Respondent takes issue with the Applicant's request for suspension of the time limits and correctly points out that neither the Applicant nor the medical report have established or explained how or why the Applicant's depression prevented him from filing a timely application. He further points to letters dated 20 and 24 February 1999 written by the Applicant to the Respondent requesting a review of the decision made by the Respondent on 21 June 1998. The Respondent submits that these letters constitute strong evidence that the Applicant was quite able to submit his application in time. In the opinion of the Tribunal these letters belie the suggestion that the Applicant was suffering from any form of mental disability which would have precluded him from making a timely application to the Tribunal. In the opinion of the

Tribunal the letters are clear, lucid and concise. They indicate without doubt that the Applicant was fully aware of his right to appeal to the Tribunal.

VIII. The Tribunal is satisfied that the Applicant has not established the existence of exceptional circumstances which would justify suspending the time limits.

IX. In view of the foregoing, the Tribunal decides that the application is not receivable, being time-barred.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Kevin HAUGH
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary

SEPARATE OPINION OF MR. C.F. AMERASINGHE

I agree with the conclusion of the Tribunal that the application is irreceivable because it was filed out of time and there were no exceptional circumstances justifying the delay. However, I disagree partially with the basis on which that conclusion was reached.

I dissociate myself from the finding concerning the veracity and credibility of the Applicant (paragraphs III and IV of the judgement). That finding was based on evidence presented on the merits of the case. It was unnecessary for the Tribunal to consider any aspect of the merits in order to find the application irreceivable. There was sufficient cogent evidence in the pleadings of both parties on the preliminary objection raised by the Respondent to support the conclusion that the application was out of time and there were no exceptional circumstances to justify the delay. This evidence was that (i) the medical certificate provided by the Applicant did not clearly state that he was so affected by his mental state that he could not have seen to the filing of an application, (ii) the Applicant wrote two very coherent letters concerning his case to the Respondent not long after the Respondent's decision was communicated to him, and (iii) in any case one year's delay was unwarranted even if the Applicant's mental condition was such as he claims it was (which it was not) because even in these circumstances action could have been taken in much less than a year through a representative. Thus, the Tribunal should have concluded purely on this evidence that the Applicant had not discharged his burden of proof to show that there were exceptional circumstances justifying a delay, particularly more than one year, though a much shorter delay may have in the circumstances been justified.

In international litigation, e.g., before the International Court of Justice, when a preliminary objection relating to jurisdiction or admissibility is raised in the Respondent's answer, usually the preliminary objection is separated from the merits and no arguments are heard on the merits until the preliminary objection is disposed of. Sometimes the objection is joined to the merits because the Court feels that the objection is inextricably involved with the facts in the merits. (For example, in the *Barcelona Traction Co. Case (Preliminary Objections)*, 1964 ICJ Reports, p. 6 the Court did both. Two objections were decided without having the Respondent's memorial on the merits while

two were joined to the merits.) Some international administrative tribunals (IATs) have adopted this practice when the Respondent makes a request for separation. (See *Tarrab (No. 9)*, ILOAT Judgement No. 499 (1982) and *Nielsen*, ILOAT Judgement No. 522 (1982) for the discussion of the practice of ILOAT). On the other hand, presumably in order to have cases disposed of expeditiously and with cost savings to the parties, respondents before IATs do not usually request the separation of preliminary objections and, even if they do, tribunals may not grant such requests. The practice of this Tribunal is against separation. Also separation is not requested generally by the Respondent.

However, the practice of non-separation of issues does not mean that the Tribunal should examine the merits of a case after arguments are presented on both the preliminary issues and the merits, unless it is essential for the disposition of the preliminary issues and the merits are inextricably linked to the preliminary issues. In this case, as already stated, I have concluded that the merits are not so inextricably linked to the preliminary objection and that the latter can be decided without an examination of the merits. Indeed, it may even be the case that there are questions to be asked about the evidence presented in the merits.

I should conclude by stating that as a matter of legal procedure the Tribunal should, in principle, scrupulously follow the practice of not examining the merits of a case where a preliminary objection to jurisdiction or irreceivability is raised. It is not in the interest of justice that the merits be examined in these circumstances. The real purpose of a preliminary objection of this nature is to avoid an examination or discussion of the merits.

(Signatures)

Chittharanjan Felix AMERASINGHE
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary